

No. 15634

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United States  
Court of Appeals  
for the Ninth Circuit

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CONFIDENTIAL, INC., a Corporation,  
Appellant,  
vs.

EDMUND G. BROWN, Attorney General, State of  
California, et al.,  
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division.

FILED

AUG - 5 1957

PAUL P. O'BRIEN, CL



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

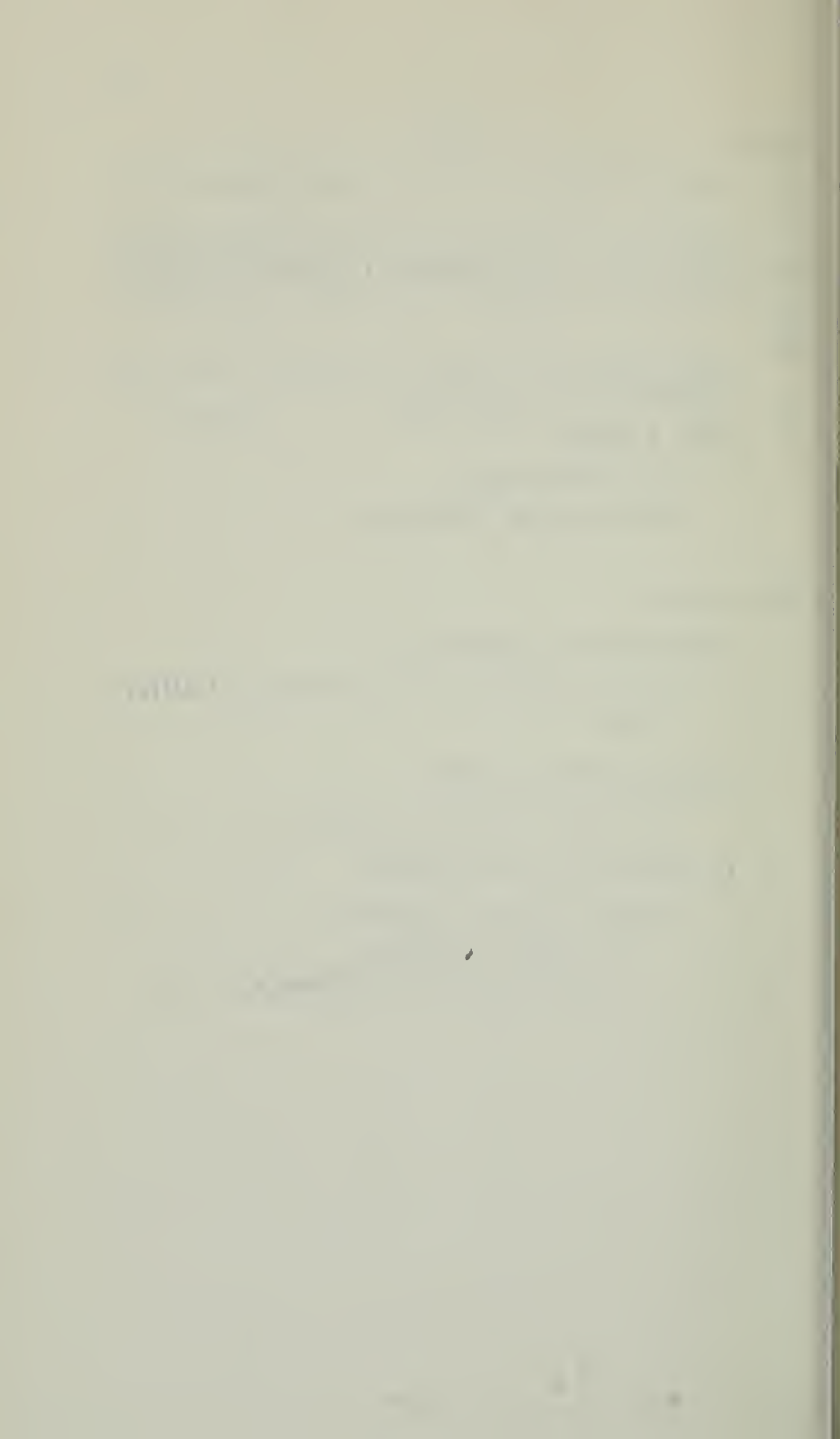
ARTHUR J. CRAWLEY,  
BEN LEVIN,  
515 Taft Building,  
Hollywood 28, California.

For Appellee:

EDMUND G. BROWN,  
Attorney General of the State of California;

CLARENCE A. LINN,  
Assistant Attorney General;

B. ABBOTT GOLDBERG,  
Deputy Attorney General,  
600 State Building,  
San Francisco 2, California.





United States District Court, in and for the Southern District of California, Central Division

No. 725-57—HW

CONFIDENTIAL, INC., a New York Corporation,

Plaintiff,

vs.

EDMUND G. BROWN and CLARENCE A. LINN,

Defendants.

### COMPLAINT

- (1) Damages for Suppression of Sale of Magazines,
- (2) Restraining Order and Injunction,
- (3) Demand for Jury Trial.

Plaintiff for its Complaint alleges as follows:

#### I.

That jurisdiction is founded on diversity of citizenship and amount, in that plaintiff is a corporation organized and existing under and by virtue of the Laws of the State of New York, and defendants, Edmund G. Brown and Clarence A. Linn, are citizens and residents of the State of California, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

That jurisdiction is also founded on the existence of a Federal issue in that the action arises under

Section 1 of the Fourteenth Amendment to the Constitution of the United States and under U.S.C.A., Title 28, Sec. 1343, in the abridgment of plaintiff's freedom of speech and press by acts of the defendants under [2\*] color of State authority and color of State law, as hereinafter set forth.

## II.

At all times herein mentioned, plaintiff was engaged in the publication and distribution of a certain magazine entitled "Confidential" for public sale and has been granted the right to use the United States mails for its distribution by order of the Postmaster General of the United States. That said magazine is issued on a bi-monthly basis and is devoted to the publication of news items relating to persons prominent in the public eye and events of common public interest.

## III.

That since September, 1952, said magazine has been sold by plaintiff to Publishers Distributing Corp., a New York corporation, which Publishers Distributing Corp. distributes and sells said magazine throughout the United States and to wholesalers in the State of California, who in turn sell same to numerous magazine and newspaper dealers and to the reading public in the State of California. That in the sale of said magazine to Publishers Distributing Corp. by plaintiff Publishers Distributing Corp. has contracted to pay to plaintiff the sum of

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

141½¢ for each copy of said magazine delivered to it for distribution.

#### IV.

That at all times hereinafter mentioned, the defendants, Edmund G. Brown and Clarence A. Linn, were and now are, respectively, the Attorney General of the State of California and the Assistant Attorney General of the State of California, purporting to act within the scope of their authority as such officers.

#### V.

That on or about May 29, 1957, said defendants, under color of their offices as Attorney General and Assistant Attorney General of the State of California, and under color of California [3] statutes, censored and suppressed the distribution and sale of said magazine by means of communications addressed to said distributor and to California wholesalers of said magazine, threatening them with criminal prosecution if they placed for sale or sold said magazine which was scheduled for sale in California, said acts of the defendants being accomplished in the following manner:

On or about May 29, 1957, defendant, Clarence A. Linn, with the knowledge, consent and authority of defendant, Edmund G. Brown, communicated by telephone with distributor, Publishers Distributing Corp. of New York, and stated that he was the Assistant Attorney General of the State of California; that in his opinion "Confidential" magazine is libelous and obscene and contains matter which vio-

lates California statutes, and that criminal prosecution would follow if it was thereafter placed for sale; that if said magazine was thereafter placed for sale in California he would seek Grand Jury indictments against Publishers Distributing Corp. and its officers.

On or about May 29, 1957, defendants, Edmund G. Brown and Clarence A. Linn, prepared and caused to be published in California newspapers of general circulation their statement to the effect that "Confidential" magazine contains lewd, obscene and libelous matter in violation of California statutes and that any distribution or sale of the magazine in the State of California, will result in criminal prosecution, a copy of said newspaper publication being marked Exhibit "A," attached hereto and incorporated herein as though herein set forth in full.

## VI.

That an issue of said magazine has been printed for sale in June, 1957, and 325,000 copies thereof were regularly scheduled for sale to said distributor for distribution in the State of California. That by reason of the foregoing acts and threats of defendants, said distributor and the California wholesalers and [4] dealers have refused to buy or accept any copies of "Confidential" magazine for distribution in the State of California, and plaintiff is unable to sell or distribute same, to plaintiff's damage in the sum of \$47,125.00, constituting the price payable by Publishers Distributing Corp. to plaintiff for 325,000 copies.

## VII.

That plaintiff has expended large sums of money for the promotion of said magazine and in building up a consumer and advertising demand therefor. That the failure to distribute said issue of the magazine currently printed for sale will cause plaintiff great damage, in that the public demand for and market value of said issue and of future issues will be seriously impaired, to the damage of plaintiff in the sum of \$1,000,000.00.

## VIII.

That the format, general content and nature of said magazine remains substantially the same for each issue, and by reason of said acts and threats by defendants said distributor and wholesalers have refused and do still refuse to accept, distribute or sell any further issues of said magazine. That defendants knew that the format, general content and nature of said magazine remains substantially the same for each issue and that their said acts and threats would suppress the distribution and sale of all future issues of the magazine as well as that currently scheduled for sale. That defendants further knew that their said acts and threats were unlawful and not within the scope of their power or authority as Attorney General or Assistant Attorney General of the State of California or otherwise. That said acts and threats of defendants were performed wilfully and maliciously with the intent to oppress plaintiff and to suppress the currently printed and all future issues of said magazine and



for the purpose of destroying plaintiff's business and causing it to become bankrupt.

That said wilful and malicious acts and threats of [5] defendants have deprived and continue to deprive plaintiff of civil rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, to wit, the right to freedom of speech and press.

That on or about June 7, 1957, plaintiff communicated with defendants through defendant, Clarence A. Linn, and informed them of the unlawful nature of their said acts and threats and of the damages resulting therefrom, but defendants refused to retract said statements and threaten to continue to pursue said course of conduct.

That by reason of said wilful, malicious and oppressive acts plaintiff demands punitive damages against defendants and each of them in the sum of \$1,000,000.00.

#### IX.

That by reason of the fact that the format, general content and nature of said magazine remains substantially the same for each issue, said acts and threats of defendants have caused said distributor and the California wholesalers to refuse to accept, distribute or sell any future issues of said magazine in California and have thus caused plaintiff irreparable damage and may bankrupt its business, to the damage of plaintiff in a sum that cannot be fully ascertained. That upon ascertaining any por-

tion of such damage plaintiff will ask leave to amend this Complaint accordingly.

Wherefore, plaintiff prays judgment as follows:

1. For special damages against defendants and each of them in the sum of \$1,047,125.00, and such additional damages as may be provided for by an amendment to Paragraph IX of this Complaint;

2. For punitive damages against said defendants and each of them for said wilful and malicious oppressive acts, in the sum of \$1,000,000.00;

3. That defendants and each of them and their agents, [6] successors, deputies, servants and employees and all persons acting by, through or under them, or either of them, or by or through their order, be restrained and enjoined from engaging in said acts and threats, and defendants and each of them be ordered to execute and deliver written retractions of all said oral and written communications to said distributor, Publishers Distributing Corp., and to all said California wholesalers;

4. That after due notice to defendants a preliminary injunction shall issue, enjoining the defendants and each of them and their agents, successors, deputies, servants and employees and all persons acting by, through or under them, or either of them, or by or through their order, from engaging in said acts and threats, and ordering defendants and each of them to execute and deliver written retractions of all said oral and written communications to said distributor, Publishers Distrib-

uting Corp., and to all said California wholesalers, and that defendants be ordered on a day fixed to show cause why said preliminary injunction should not be granted;

5. That pending the hearing on said preliminary injunction, a temporary restraining order issue without notice, restraining the defendants and each of them and their agents, successors, deputies, servants and employees and all persons acting by, through or under them, or either of them, or by or through their order, from engaging in said acts and threats, and ordering defendants and each of them to execute and deliver written retractions of all said oral and written communications to said distributor, Publishers Distributing Corp., and to all said California wholesalers;

6. For the costs of court incurred herein;

7. For such other and further relief as the Court deems proper in the premises.

ARTHUR J. CROWLEY, and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff. [7]



EXHIBIT A

Same Action Looms for Confidential

‘Whisper’ Scandal  
Mag Banned in Cal.

Whisper Magazine, a little sister of Confidential, both published by Robert Harrison, was banned from California newsstands today by the attorney general’s office.

Simultaneously, the attorney general’s office moved to seek extradition from New York of Harrison and others indicted in a secret Grand Jury session May 14, 15.

They, and Francesca de Scaffa, ex-wife of Actor Bruce Cabot, were charged with conspiracy to distribute lewd and obscene material, a felony.

Outlaw Sale

Outlawing the sale of Whisper, Assistant Attorney General Clarence Linn telegraphed warnings to 35 major magazine wholesalers in California that they were selling “lewd, obscene and libelous material.”

Harrison promised to ship 100,000 copies back to New York, Linn said. The banned issue was due to go on sale June 4.

Linn indicated similar measures would be instituted against the next issue of Confidential, due on the newsstands June 20.

Violates Cal. Law

“Major wholesalers” in the state have given “favorable response” to his telegrams, Linn said.

The telegrams said:

“The current ‘Whisper’ magazine now in your possession contains printed matter which is in violation of California statutes prohibiting publication of lewd, obscene and libelous material.

“Distribution of this magazine by you will be deemed part of the conspiracy now the subject of a grand jury investigation, pending in Los Angeles County, and your activity will be called to the attention of that body for appropriate action.

“Your dealers also will be considered parties to the conspiracy.”

Demand is hereby made for jury trial.

ARTHUR J. CROWLEY, and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed June 13, 1957. [8]

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[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR  
PRELIMINARY INJUNCTION

To Edmund G. Brown and Clarence A. Linn, defendants in the above-entitled action:

You Will Please Take Notice that plaintiff will move the Court at its Courtroom in the Federal

Building, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, June 17th, 1957, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, for a preliminary injunction in said action to continue until the final determination thereof, restraining defendants, Edmund G. Brown and Clarence A. Linn, and all persons acting by, through or under them, or either of them, or by or through their order, from declaring orally or in writing that "Confidential" magazine contains any matters which are lewd, obscene or libelous, or threatening the publisher, distributors, wholesalers or vendors of said magazine with criminal prosecution or Grand Jury [11] investigation for the distribution or sale of same.

Said motion will be made on the grounds that the aforementioned acts to be enjoined have inflicted and will continue to inflict irreparable damage to plaintiff for which money will not be adequate relief and that plaintiff has no plain, speedy or adequate remedy at law.

Upon the hearing of said motion there will be used the Complaint herein and the affidavit of Arthur J. Crowley, a copy of which is herewith served upon you.

ARTHUR J. CROWLEY and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff.

For good cause shown time for service and hearing of the foregoing Notice of Motion and Motion is shortened said service to be made on June 13, 1957, on opposing counsel.

Dated this 13th day of June, 1957.

/s/ HARRY C. WESTOVER,  
United States District Judge.

[Endorsed]: Filed June 13, 1957. [12]

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[Title of District Court and Cause.]

AFFIDAVIT OF ARTHUR J. CROWLEY IN  
SUPPORT OF MOTION FOR PRELIMI-  
NARY INJUNCTION

State of California,  
County of Los Angeles—ss.

Arthur J. Crowley, being first duly sworn, deposes and says as follows:

That plaintiff is unable to distribute its magazine entitled "Confidential" in the State of California by reason of the fact that Publishers Distributing Corp. of New York, the national distributor of said magazine, and the California wholesalers of said magazine refuse to accept, distribute or sell same due to a fear of criminal prosecution by the defendants as Attorney General and Assistant Attorney General of the State of California.

That said fears of the distributor and wholesalers and their resultant refusal to accept, distribute or sell said magazine is directly caused by communications to them from the defendants in [13] their purported capacity as Attorney General and Assistant Attorney General of the State of California threatening them with Grand Jury investigation and criminal prosecution in the event said magazine is placed for sale or sold in the State of California.

That by reason of the foregoing threats by defendants, said distributor and wholesalers not only refuse to distribute and sell the issue of "Confidential" magazine which is scheduled for sale in June, 1957, but also refuse to accept, distribute or sell any future issues of said magazine.

/s/ ARTHUR J. CROWLEY.

Subscribed and sworn to before me this 12th day of June, 1957.

[Seal]      /s/ JANET McDONALD,  
Notary Public in and for Said County and State of  
California.

[Endorsed]: Filed June 13, 1957. [14]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In the instant case, the Defendants, Edmund G. Brown and Clarence A. Linn, respectively, Attorney General and Assistant Attorney General of the State of California, under color of their offices, censored and suppressed the publication of "Confidential" magazine by personally declaring it to contain lewd, obscene and libelous matter and threatening its distributors and wholesalers with Grand Jury investigation and criminal prosecution. No such authority of censorship is vested in them by any law of the State of California.

California Constitution Article I, Section 9, provides as follows:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." [15]

Thus the California Constitution provides that there shall be no censorship or suppression of press publications, although an abuse of the right may result in punishment by due process of court.

The Case of *People vs. Armentrout*, 118 C.A. Supp. 761, 1 P. 2d 556, provides as follows:



“The right of free speech and of the free press is guaranteed by the Constitution of California, Article I, Section 9.”

The court goes on to say, “Liberty of circulation is as essential to that freedom as liberty of publishing, indeed without circulation, a publication would be of little value, citing the case of *Ex Parte Jackson*, 96 U.S. 727, 24 L. Ed. 877.” The court further states, “The word publish ordinarily means to disclose, reveal, proclaim, circulate or make public, citing *In Re Monrovia Post*, 199 Cal. 263, 248 P. 1017.” The court further states, “The constitutional guarantee against the abridgment of the freedom of the press means immunity from restraint previous to publication.”

In the case of *People vs. Garcia*, 37 C.A. 2d Supp. 753, 98 P. 2d 265, the court states:

“Citing *People vs. Gidaly*, 93 P. 2d 660 at 669: While a law may be valid which in effect punishes the use of language which has the effect of inciting the unlawful use of violence or the commission of crime, the end may not (save possibly in such extraordinary situations as are mentioned in the authority next hereinafter cited) be attained through the medium of censorship or previous restraint. (Citing cases.) These rights (freedom of speech, press and assembly) may be abused by using speech or press or assembly in order to incite to violence [16] and crime. The people through their Legislatures (or by the initiative) may protect

themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. (Citing cases.) As further authority for the propositions declared in the foregoing quotation may now be added the citation of *Schneider vs. State*, 60 Supreme Court 146."

In the *Garcia* case, the court pointed out that under the California Constitution, the Legislature may pass laws which deal with an abuse of the right of freedom of speech and press, but may not curtail the rights. Thus they may punish the abuse but, except only in extraordinary circumstances, they may not pass laws for censorship or suppression. In the instant case the Defendants, acting under color of their offices as Attorney General and Assistant Attorney General of California, and without recourse to any court action and without any authority of law attempted to, and did censor and suppress the issuance of Plaintiff's magazine.

The leading case of *Hannegan vs. Esquire*, 327 U.S. 146 (1946), held that the Postmaster General acted without authority in revoking "Esquire" magazine's second class mailing permit because it did not "contribute to public good and public welfare." In said case the court further stated:

"What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. \* \* \* But a requirement



that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. \* \* \* From the multitude of competing offerings the public will pick and choose. What seems to one trash may have for others fleeting or even enduring values.” [17]

The case of *Bantam Books vs. Melko*, 25 N.J. Superior 292, is a case directly in point with the instant case. There the court held that censorship of the book, “*The Chinese Room*” by the Defendant, who was Prosecutor of the Pleas of Middlesex County, New Jersey, was subject to injunction. The court in that case went on to say:

“Defendant could have proceeded against Plaintiff or any distributor in an orderly fashion under at least the first of the cited statutes. Had he done so there would then have been called into play the full range of criminal prosecution, from complaint and arrest, through indictment and trial by jury, with a verdict of guilty before any penalty could be invoked.” \* \* \* “There are, then, several alternate and proper legal means at hand for dealing with allegedly obscene and indecent literature, none of which Defendant used. The three statutes referred to give the law enforcement officials effective means of preserving and protecting the community morals, but none of them gives any such official the right to prejudge a situation and act upon it in the way Defendant did in this case. We have here a clear case of previous censorship in the area of literary obscenity. The way of the censor has been

torturous and tortured from earliest times. His story is one of arbitrary judgment and the suppression of much that we now consider good, true and beautiful." The court then goes on to say, "The liberty of the press which the First Amendment guarantees against abridgment by the Federal Government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action, citing *Gitlow vs. New York*, 268 U.S. 652."

In the case of *Near vs. Minnesota*, 283 U.S. 697, the [18] court held:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guarantee to prevent previous restraint upon publication." Chief Justice Hughes, speaking for the court in this case, went on to state, "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship."

The case of *Lovell vs. Griffen*, 303 U.S. 444 (1938), states that in its historic connotation, the press comprehends every sort of publication, and the guarantee of a free press covers distribution as well as publication.

The evil of previous restraint was condemned most recently, in a case of motion pictures in the

case of *Joseph Burstyn, Inc., vs. Wilson*, 343 U.S. 495 (1952).

In the case of *Higgins vs. Krogman*, 140 N.J. Eq. 518, affirmed on appeal in 142 N.J. Eq. 691, the court stated as follows:

“There is ample authority for the proposition that valuable property rights will be protected by injunction from damage or destruction, threatened or resulting, from the arbitrary acts of officials acting without due process of law.” \* \* \* “Insofar as his (the vice-chancellor’s) restraining order was confined to a restraint of the described extra-legal activities, it was clearly, under the undisputed facts and circumstances, a proper exercise of the Court of Chancery’s jurisdiction to protect complainant’s property from irreparable injury threatened [19] by ‘arbitrary acts of officials acting without due process of law.’ ”

And, as was stated in the case of *Ruty vs. Huelsenbeck*, 109 N.J. Eq. 273, the court stated:

“It would be intolerable if the operation of any business might be interfered with because some police officer came to the conclusion that the business was being operated in violation of the law. Such a condition would result in a government of men, not of law.”

In the case of *Dearborn Publishing Co. vs. Fitzgerald*, 271 Fed. 479, the Mayor and the Chief of Police of Cleveland, acting under color of an ordinance proscribing the sale of obscene and scandal-

ous literature, threatened agents of a publishing company with arrest if future editions of the newspaper were sold on the streets of Cleveland. In enjoining the city officials from continuing such threats, the court said:

“The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous, but if it were, the city’s power would be to conduct a prosecution for the specific offense thus committed, and not the establishment of a censorship in advance of future publications, and prohibition generally of the sale thereof upon the streets, in the same manner as other publications may be sold.”

The case of *American Mercury, Inc., vs. Chase*, 13 Fed. 2d 224, holds as follows:

“The injury to the persons affected does not flow from any judgment of a court or public body; it is caused by the defendant’s notice, which rests on the defendant’s judgment. The result on the other person is the same, whether that judgment be right or wrong, i.e., the sale of his magazine or book is seriously interfered with. [20] Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the

coercion and intimidation of that trade, through the fear of prosecution if the defendant's views are disregarded."

In discussing the American Mercury case, the United States District Court in the Northern District of Ohio, Eastern Division, in Civil Action No. 30167, entitled *The New American Library of World Literature, Inc., vs. Edward J. Allen, Jr.*, individually and as Chief of Police of the City of Youngstown, Ohio, et al., the court pointed out that while the American Mercury case involved no action of a public official, it shed light on the issues here presented for determination, in that where public officials exceed their lawful powers they can no longer act as duly authorized agents of government. The court further said that in such cases they act with no greater legal authority than private persons or private organizations as the defendant police officer in that action possessed no lawful power to suppress publications under threat of prosecution.

In *The New American Library of World Literature, Inc.*, case, *supra*, the court stated:

"Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guarantees." Citing *Marsh vs. Alabama*, 326 U.S. 501, at 509 (1946); *Jones vs. Opelika*, 319 U.S. 103 (1943); *Murdock vs. Pennsylvania*, 319 U.S. 105 (1943); *Martin vs. Struthers*, 319 U.S. 141 (1943). The



court then goes on to say that, "That preferred position [21] gives these guarantees a 'sanctity and sanction not permitting dubious intrusions,' " citing Thomas vs. Collins, 323 U.S. 516, at 530.

Respectfully submitted,

ARTHUR J. CROWLEY and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff.

[Endorsed]: Filed June 13, 1957. [22]

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[Title of District Court and Cause.]

### AFFIDAVIT

State of New York,  
County of New York,  
City of New York—ss.

Benjamin E. Winston, being duly sworn, says:

1. Since 1930 affiant has been duly admitted to practice law in the State of New York, and since 1947 before the United States Supreme Court.

2. Affiant maintains law offices at 475 Fifth Avenue, New York City, and is general counsel for Publishers Distributing Corp., a New York Corporation. Since the inception of Confidential magazine in 1952, Publishers Distributing Corp. has been the national distributor thereof pursuant to contract with plaintiff.

3. On May 29, 1957, defendant, Clarence A. Linn, Assistant Attorney General of California (hereinafter called "Linn"), telephoned affiant from San Francisco, California. Affiant had previously conferred with Linn in New York City and had spoken by telephone with him in New York City and California. During the conversation, Linn stated that if Publishers Distributing Corp. distributed any further issues of Confidential magazines in California, he (Linn) would go before the Grand Jury and seek indictments [23] against California wholesalers who handled said magazine and, in addition thereto, Publishers Distributing Corp. and its officers, Linn further stated that, in his opinion, the material published in Confidential magazine was obscene and libelous and violated California law. Affiant told Linn he would report the message to Publishers Distributing Corp.'s president, Samuel Scheff.

4. Affiant promptly communicated Linn's threat to said Samuel Scheff and warned him that Linn's threat posed a serious problem to Publishers Distributing Corp.'s officers and California wholesalers.

5. Affiant is informed that Publishers Distributing Corp. thereupon notified plaintiff that because of Linn's said threat, Publishers Distributing Corp. would not distribute to its California wholesalers the September, 1957, and succeeding issues of Confidential magazine until the threat of criminal prose-

cution against the distributors of said magazine was removed.

/s/ BENJAMIN E. WINSTON.

Sworn to before me this 14th day of June, 1957.

/s/ ANNE MONTELEONE,

Notary Public, State of New  
York.

Receipt of copy acknowledged.

[Endorsed]: Filed June 17, 1957. [24]

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[Title of District Court and Cause.]

### MOTION TO DISMISS

The defendants move to dismiss this action because:

1. The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.

2. This action is in fact against the State of California and the individual defendants are the Attorney General of the State of California and the Assistant Attorney General of the State of California and are sued in their representative capacity; it appears from the body of the complaint that the matter involved is one in which the State of California is primarily concerned and therefore the action is essentially one against the State of California.



3. It is brought in the wrong district, the jurisdiction of this court being involved on the ground that the [26] action arises under the Constitution and laws of the United States in addition to the ground of diversity of citizenship of the parties, and the defendants are residents of the Northern District of California, all of which more clearly appears from the affidavit of Clarence A. Linn served and filed herewith.

/s/ EDMUND G. BROWN,  
Attorney General of the State  
of California;

/s/ CLARENCE A. LINN,  
Assistant Attorney General;

/s/ B. ABBOTT GOLDBERG,  
Deputy Attorney General,  
Attorneys for Defendants.

[Endorsed]: Filed June 17, 1957. [27]

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[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO APPLICATION  
FOR INJUNCTION PENDENTE  
LITE AND IN SUPPORT OF MOTION TO  
DISMISS

State of California,  
County of Los Angeles—ss.

Clarence A. Linn, being first duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in all of the courts of the State

of California, and the federal courts located within the State of California.

That Edmund G. Brown is the duly elected, qualified and acting Attorney General of the State of California, and that affiant is a duly appointed, qualified and acting Assistant Attorney General of the State of California; that Edmund G. Brown and Clarence A. Linn are the defendants in the above-entitled [28] action and are residents of the Northern District of California and are not now and never have been residents of the Southern District of California. That Edmund G. Brown and Clarence A. Linn have stated all of the facts and circumstances in the above-entitled action to B. Abbott Goldberg, who is an attorney at law admitted to practice in the State of California, and after said statement of facts they have been advised and they do believe that they and each of them have a good and sufficient defense to the above-entitled action on the merits.

That the magazine published by plaintiff and referred to in its complaint has for some time been distributed and sold in the State of California in violation of the laws of the State of California forbidding the publication of lewd, obscene and libelous matter; that each and every issue of said magazine has been replete with filthy stories, vicious innuendo and cruel libel; that the matter in the magazine is such that it cannot be set out in this affidavit, but affiant is prepared to submit to the court copies of said magazine for its inspection.

That the acts of defendants complained of, if committed at all, were committed in the performance of the duties of defendants as quasi-judicial officials of the State of California and in response to requests of distributors of said magazine who desired to know if they would be violating the law if they distributed the current issue of said magazine.

That the defendants have never at any time censored or suppressed the publication or distribution of said magazine and do not intend to do so but defendants will after said magazine is published and distributed to wholesalers in the State of California examine said magazine if it is submitted to them and will advise those who inquire whether or not the distribution and sale of the magazine will violate the laws of the State of [29] California.

That prior to the time of any of the alleged threats defendants had submitted to the Grand Jury of Los Angeles County copies of said magazine and the facts surrounding the publication and distribution thereof and said Grand Jury did on the 15th day of May, 1957, return an indictment charging the plaintiff and a number of other persons and corporations with the crime of felony, to wit, conspiracy to publish, distribute and sell lewd, obscene and libelous matter.

That affiant makes this affidavit on behalf of himself and said Edmund G. Brown in support of a motion to dismiss said action and in opposition to the plaintiff's application for an injunction.

That the defendants propose to move for the dismissal of the above-entitled action on Monday, the 17th day of June, 1957, at the hour of 10:00 o'clock a.m. or as soon thereafter as counsel can be heard. That the above-entitled action was filed on June 11, 1957; that the papers in said action were served on the 13th day of June, 1957, and were not received by the defendants until the 14th day of June, 1957, at San Francisco, California. That defendants have requested of counsel a continuance of the hearing on the order to show cause heretofore issued herein but said request has been denied. That because of the shortness of time it has not been possible to sooner prepare and serve the moving papers in support of a motion to dismiss this action and to oppose the application for an injunction.

Wherefore, defendants pray that this court permit the papers in support of a motion to dismiss and in opposition [30] to the application for an injunction to be served and filed on the 17th day of June, 1957, and that the motion be heard forthwith.

/s/ CLARENCE A. LINN.

Subscribed and sworn to before me this 17th day of June, 1957.

[Seal]     /s/ MAUDE HONEYWILL,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 17, 1957. [31]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER AND IN SUPPORT OF MOTION TO DISMISS

Facts

Plaintiff publishes in violation of law a magazine replete with the crudest filth and most odious libel.

Defendants as the Chief Law Officers of the State of California are charged with interfering with the illegal distribution of this magazine by merely announcing that those who break the law will be arrested.

Here we have State action by State officials enforcing constitutional statutes as is their sworn duty. [32]

Plaintiff asks damages for acts already performed and an injunction to prevent further law enforcement.

Plaintiff attempts to assert in a conglomeration of allegations two causes of action: (1) first, under the Civil Rights Statute (28 U.S.C., Sec. 1343), and (2) second, for tort in interfering with a contractual relationship.

The defendants are both residents of the Northern District of California and this action was instituted in the Southern District of California.



## Argument

## I.

As to Action Under 28 U.S.C., Section 1343:

As a matter of law, plaintiff has failed to state a cause of action under U.S.C., Title 28, Section 1343, as alleged in Counts I and VII of its complaint. Subsections 1 and 2 of that statute refer to "any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42," and plaintiff has failed to allege any conspiracy on the part of defendants. Furthermore, "the complaint clearly does not state a cause of action for a denial of equal protection," for which Section 1985 gives a cause of action. *Jennings v. Nestor*, 217 F. 2d 153 (1955).

With respect to Subsection 3, it is a settled rule of law that these defendants, acting in their official capacities are immune from civil liability under the Civil Rights Acts. *Cawley v. Warren*, 216 F. 2d 74 (1954); *Lyons v. Baker*, 163 F. 2d 838 (1950); *Kenney v. Hatfield*, 132 F. Supp. 814 (1955).

## II.

Interference With Contractual Relations:

As for the allegations of Count IX of the complaint, plaintiff has failed to state a cause of action, and has failed [33] to state grounds upon which a temporary injunction should issue.

With respect to plaintiff's claim for damages, on the theory of inducing breach of contract, the re-

statement of torts states the law as follows (Sec. 766) :

“Except as stated in Section 698, one who without a privilege to do, induces or otherwise purposely causes a third person not to

- (a) perform a contract with another, or
- (b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.”

Section 767 defines the test of privilege in terms of

- “(a) the nature of the actor’s conduct,
- (b) the nature of the expectancy with which his conduct interferes,
- (c) the relations between the parties,
- (d) the interest sought to be advanced by the actor, and
- (e) the social interests in protecting the expectancy on the one hand and the actor’s freedom of action on the other hand.”

In *Imperial Ice Co. v. Rossiter*, 18 Cal. 20, 33, 35, the court recognized the above in saying: “Thus, a person is justified in inducing the breach of a contract the enforcement of which would be injurious to health, safety or good morals.” As the complaint states (Count V), at the time of the acts complained of, a grand jury investigation of the plaintiff’s publication was pending in Los Angeles.\* Defend-

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\*In fact indictment had been returned on May 15, 1957.

ants were consequently acting in good faith in apprising plaintiff's [34] distributors of their possible criminal liability under the appropriate California statutes; indeed they were acting in performance of their duties as Chief Law Enforcement Officers of the State. The public interest demands no less. See *Gregoire v. Biddle*, 177 F. 2d 579 (1949).

With respect to plaintiff's motion for a temporary injunction, it is well accepted that the power to issue temporary injunctions is an extraordinary one and should be exercised with great caution, within the sound discretion of the trial court. Here plaintiff's alleged injury is in no way irreparable; monetary compensation would be adequate, and delay will not otherwise endanger plaintiff's rights. *Lagunitas Water Co. v. Marin County Water Co.*, 163 Cal. 332, 125 P. 351 (1912). And equity will not by injunction protest a business conducted for an illegal purpose or in violation of a criminal statute. *Downing v. State Board of Pharmacy*, 85 Cal. App. 2d 30, 192 P. 2d 39 (1948). For purposes of this motion, the material contained in the complaint must be taken as true, and plaintiff does not deny the truth of the assertions contained in the defendants' telegram, namely, that the plaintiff's publication contained illegal matter.

### III.

#### Wrong Jurisdiction

This action is pending in the Southern District of California. The defendants reside in the Northern



District of California. An action such as this one can only be brought in the district of the residence of the defendants (U.S.C., Title 28, Sec. 1391). [35]

Under the circumstances a motion to dismiss must be granted (Fed. Rules of Civil Procedure, Rule 12(b)).

The action should be dismissed.

/s/ EDMUND G. BROWN,  
Attorney General of the State  
of California;

/s/ CLARENCE A. LINN,  
Assistant Attorney General;

/s/ B. ABBOTT GOLDBERG,  
Deputy Attorney General,  
Attorneys for Defendants.

[Endorsed]: Filed June 17, 1957. [36]

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[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO MOTION TO  
DISMISS

I.

Transitory Action

The defendants contend that they reside in the Northern District of California and that thus this

action can only be brought in the Northern District. However, this action is transitory in its nature as its subject-matter is an injunction and damages against the defendants, and may, therefore, be brought in any District where the defendants are served with process. The defendants were served with process in the Southern District of California and, therefore, the action is properly brought in this District.

Stone vs. United States,  
167 U.S. 178.

“\* \* \* the gravamen of the action was the conversion of the lumber and railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, [37] but for the value of the personal property so converted by the defendant.”

“\* \* \* The action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process.”

Mauser vs. Union Pacific Railway Company,  
243 Fed. 274.

A transitory action follows the person and can be brought wherever the defendant can be found, whether the action is *ex delicto* or *ex contractu*.

Rackow vs. United Excavating Co.,  
67 Fed. Supp. 699 (1946).

The court in determining whether or not the cause of action was transitory or local in its nature, for the purpose of determining whether the action was brought in the proper District, held as follows: "It is conceded by the defendant that the general rule is that, where an action in its essential features is related to personal property, it is transitory and may be brought in any jurisdiction in which the defendant can be found and served with process."

Thus, this action was properly brought in the Southern District of California, where the defendants were served with process.

## II.

### Transfer of Action

Even if the transitory character of this action, set forth in Paragraph I above, were completely disregarded, defendants would be incorrect in their allegation that the "Motion to dismiss must be granted" under USC, Title 28, Section 1391, for they fail to [38] take into consideration USC, Title 28, Section 1406, which provides as follows:

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Thus, if the court could hold that this action is not transitory and that it properly belongs in the Northern District of California, in the interest of justice the court may transfer the case to the Northern District instead of dismissing it. Certainly the interests of justice would be better served by a transfer, as a dismissal would only result in plaintiff being required to file the case anew and cause delay in determination of the matter on its merits.

Respectfully submitted,

ARTHUR J. CROWLEY and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 20, 1957. [39]

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[Title of District Court and Cause.]

MINUTES OF THE COURT, JUNE 17, 1957

Present: Hon. Harry C. Westover, District Judge.

Counsel for Plaintiff: Arthur J. Crowley,  
Esq., and Ben Levin, Esq.

Counsel for Defendant: Clarence A. Linn,  
Esq., and Wm. V. O'Connor, Esq.

Proceedings:

Hearing on motion of the plaintiff (filed June 13, 1957) for Preliminary Injunction:

Counsel argue.

Court make a statement and denies plaintiff's motion for preliminary injunction, and further orders that defendants' motion to dismiss, presented and filed this day, be set for hearing at 10:00 a.m., July 1, 1957.

JOHN A. CHILDRESS,  
Clerk;

By /s/ MARY O. SMITH,  
Deputy Clerk. [41]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff, Confidential, Inc., hereby appeals to the U. S. Court of Appeals for the 9th Circuit from the order made and entered in this action on June 17, 1957, denying a preliminary injunction to restrain defendants, Edmund G. Brown and Clarence A. Linn, and all persons acting by, through, or under them, or either of them, or by or through their order, from declaring orally or in writing that "Confidential" magazine contains any matters which are lewd, obscene or libelous, or threatening the publisher, distributors, wholesalers or vendors of said magazine

with criminal prosecution or Grand Jury investigation for the distribution or sale of same.

ARTHUR J. CROWLEY and  
BEN LEVIN,

By /s/ ARTHUR J. CROWLEY,  
Attorneys for Plaintiff and  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 20, 1957. [42]

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[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause;

Complaint;

Notice of Motion and Motion for Preliminary Injunction;

Affidavit of Arthur J. Crowley in Support of Motion for Preliminary Injunction;

Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction;

Affidavit of Benjamin E. Winston;

Motion to Dismiss;

Affidavit in Opposition to Application for Injunction Pendente Lite and in Support of Motion to Dismiss;



Points and Authorities in Opposition to Application for Temporary Restraining Order and in Support of Motion to Dismiss;

Memorandum of Points and Authorities in Opposition to Motion to Dismiss;

Minutes of the Court for June 17, 1957;

Notice of Appeal;

Designation of Record on Appeal;

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 26th day of June, 1957.

JOHN A. CHILDRESS,

Clerk;

/s/ CHARLES E. JONES,

Deputy.

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[Endorsed]: No. 15634. United States Court of Appeals for the Ninth Circuit. Confidential, Inc., a Corporation, Appellant, vs. Edmund G. Brown, Attorney General, State of California, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 27, 1957,

Docketed July 20, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 725-57 HW

CONFIDENTIAL, INC., a New York Corporation,  
Plaintiff and Appellant,

vs.

EDMUND G. BROWN and CLARENCE A.  
LINN,  
Defendants and Appellees.

APPELLANT'S POINTS ON APPEAL AND  
DESIGNATION OF RECORD

I.

The following constitutes a statement of the points on which Appellant relies:

(1) That the Defendants and Appellees, Edmund G. Brown and Clarence A. Linn, hereinafter referred to as Defendants, at all times herein concerned were and are respectively the Attorney General and Assistant Attorney General of the State of California.

(2) That the Plaintiff and Appellant, hereinafter referred to as Plaintiff, at all times herein concerned was and is engaged in the publication of a magazine entitled "Confidential," which magazine is distributed throughout the State of California and the United States.

(3) That defendants, under color of their offices as Attorney General and Assistant Attorney General of California, precensored, restrained and suppressed the distribution and sale in California of the issue of "Confidential" magazine which was scheduled for sale in June, 1957, and all future issues of said magazine, by declaring to the national distributor and to all California wholesalers of the magazine that in the opinion of Defendants said magazine contains lewd, obscene and libelous matter and threatening that any sale or offer for sale of any future issues of said magazine will result in the Defendants obtaining criminal prosecution against them. That Defendants threaten to continue their said course of conduct as to all future issues of said magazine.

(4) That said acts of Defendants are unlawful in that they are in violation of the plaintiff's right of free press as safeguarded by the Fourteenth Amendment to the United States Constitution.

(5) That said acts of Defendants were and are outside the scope of their authority and power as Attorney General and Assistant Attorney General of California and thus Defendants are not immune from civil suit.

(6) That said acts of Defendants constitute a wilful and unprivileged interference with the contract between plaintiff and Publishers Distributing Corp., the national distributor of said magazine, resulting in damage to plaintiff in certain ascer-

tained sums, together with other and irreparable damage.

(7) That preliminary and permanent injunctions should issue against Defendants pursuing said course of conduct.

## II.

Appellant designates the entire record of the District Court as material to the consideration of this appeal.

Dated: July 23, 1957.

ARTHUR J. CROWLEY and  
BEN LEVIN,

By /s/ BEN LEVIN,  
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 23, 1957.